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—(1888)—

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

RAJRUP SINGH AND ANOTHER (TWO OF THE PRINCIPAL DEFENDANTS)
v. RAMGOLAM ROY (PLAINTIFF).^{*}

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January 30

*Civil Procedure Code, 1882, s. 244—Question relating to execution of decree—
Parties to suit—Representatives.*

K and *M* were brothers alleged to be joint in food, dwelling, and business. In a suit which was brought against *K*, and which was unsuccessfully defended by him on behalf of himself and the joint family, a decree for costs was passed against him. *K* died after decree, and the decree-holder in execution had *K*'s sons put on the record as his representatives. Certain property was attached in execution, and the sons objected that the property in question had come to them as the self-acquired property of their uncle *M*, who had died after *K*, and that they had inherited no property from their father *K*. Their objection was allowed by the Court executing the decree, and the property was ordered to be released from attachment. In a suit brought by the assignee of the decree-holder against the sons of *K* to establish his right to proceed against the property in question in execution of the decree against *K*: *Held*, that the question of the liability of the property to be taken in execution in the hands of the defendant was a "question arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, &c., of the decree" within the meaning of s. 244 of the Civil Procedure Code, and that the suit was consequently not maintainable.

* Appeal from Order No. 152 of 1888, against the order of T. M. Kirkwood, Esq., Judge of Patna, dated the 18th of April 1887, reversing the decree of Baboo Troilokho Nath Mitter, Subordinate Judge of Patna, dated the 5th of February 1886.

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The cases as to the position of representatives added to the suit either before or after decree referred to and discussed.

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THE facts in this case were shortly as follows :—

Kheba Singh, the father of the defendants, and his brother Mewa-Lal, were joint in food and dwelling, and carried on business jointly as members of a joint family. In a suit which was brought against Kheba Singh, and which had been contested by him on behalf of himself and the joint family, Kheba was unsuccessful, and decrees for costs were passed against him. Kheba Singh having died after the decrees, the decree-holder, in execution of those decrees, substituted his sons as judgment-debtors in their father's place, and they were brought on the record as his representatives. The decree-holder attached certain property, and the defendants objected that they had succeeded to no property from their father, but that the property attached had come to them by inheritance from their uncle Mewa Lal, who had died after their father, and that such property had been Mewa Lal's self-acquired property. On the 22nd March 1884 this objection was allowed, and the property was released from attachment. The present suit was brought on the 21st March 1885 by a purchaser from the original decree-holder to establish his right to proceed against the property in question in execution of the decrees against Kheba Singh.

At the hearing, before the merits of the case were gone into, a preliminary objection was taken that the matter dealt with by the order of the 22nd March 1884 was, within the meaning of s. 244 of the Civil Procedure Code, a "question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree," and therefore had been properly dealt with by the Court executing the decree, and could not now be the subject of a separate suit.

The Subordinate Judge upheld this objection and dismissed the suit.

On appeal the Judge was of opinion that the proceedings and order of the Court executing the decree were taken and made under ss. 278, 280 of the Code, and not under s. 244, and that the suit was maintainable. He therefore reversed the decree of the Subordinate Judge and remanded the suit for hearing on the merits.

From this decision the defendants appealed.

Baboo *Nilmadhuk Sen* for the appellants.

Moulvie *Mahomed Yusoof* for the respondent.

The following cases were referred to in argument: *Chowdhry Wahed Ali v. Jumae* (1); *Oseemunnissa Khatoon v. Ameerunnissa Khatoon* (2); *Arundadhi Ammyar v. Natesha Ayyar* (3); *Nimba Harishet v. Sitaram Paraji* (4); *Ameeroonissa Khatoon v. Mozuffer Hossein Chowdhry* (5); *Buddu Ramaiya v. Venkaiya* (6); *Kuriyali v. Mayan* (7); *Ram Ghulam v. Hazaree Kuar* (8); *Sitaram v. Bhagwan Das* (9); *Dhiraj Mahatab Chand v. Peari Dasi* (10); *In re-Rainey* (11); *Abdul Rahman v. Muhammad Yar* (12); *Awadh Kuari v. Raktu Tewari* (13); *Shankar Dyal v. Amir Haidar* (14); *Nath Mal Das v. Tajammul Husain* (15); *Bahori Lal v. Gauri Sakai* (16); *Kanai Lal Khan v. Sashi Bhuson Biswas* (17); and *Kameshwar Pershad v. Run Bahadur Singh* (18).

The following judgments were delivered by the Court (WILSON and MACPHERSON, JJ.):—

WILSON, J.—The plaintiffs are the assignees of a decree obtained against one Kheba Singh; and in this suit they ask for a declaration that certain properties are liable to be attached and sold to satisfy that decree in the hands of the substantial defendants to the suit, who are the sons of Kheba Singh. It appears that after the decree was obtained Kheba Singh died, and that an application was made to execute the decree against the property now in question in the hands of the same persons who are now defendants; and that application was dismissed. Neither the petition nor the order has been put in evidence, and we are therefore obliged to derive our knowledge of them from the

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| (1) 11 B. L. R., 149. | (10) 6 W. R., Mis., 61. |
| (2) 20 W. R., 162. | (11) 6 B. L. R., 725. |
| (3) I. L. R., 5 Mad., 391. | (12) I. L. R., 4 All., 190. |
| (4) I. L. R., 9 Bom., 458. | (13) I. L. R., 6 All., 109. |
| (5) 12 B. L. R., 65. | (14) I. L. R., 2 All., 752. |
| (6) 3 Mad., 263. | (15) I. L. R., 7 All., 36. |
| (7) I. L. R., 7 Mad., 255. | (16) I. L. R., 8 All., 626. |
| (8) I. L. R., 7 All., 547. | (17) I. L. R., 6 Calc., 777. |
| (9) I. L. R., 7 All., 733. | (18) I. L. R., 12 Calc., 453. |

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admissions in the plaint, from which we learn that the decree-holders "filed a list of the disputed property as property belonging to the judgment-debtor Kheba Singh;" that the sons alleged in answer that "they had got it from the estate of Mewa Lal and not from the estate of Kheba;" and that by the order then made "the disputed property has been exempted from sale by auction."

The decree was subsequently assigned to the plaintiffs, and they now sue for a declaration that the property in question is liable in the defendant's hands to be attached and sold to satisfy the decree. The Subordinate Judge held that s. 244 of the Code of Civil Procedure was a bar to this suit, and he dismissed it accordingly. The District Judge reversed that decision and remanded the case for trial on the merits. Against that order the present appeal has been brought.

The sections of the Code which it seems necessary to refer to are these:—

Section 234 says: "If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

"Such representative shall be liable only to the extent of the property of the deceased which has come to his hands, and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit."

Section 244 says: "The following questions shall be determined by order of the Court executing a decree and not by separate suit, namely:—

"(a & b) relate to mesne profits.

"(c) any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree."

Section 248 says: "The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him;

“(b) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made.”

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What we have to say is whether the question of the liability of this property to be taken in execution in the hands of the present defendants—a question raised and decided in the execution proceedings, and now raised again in this suit—is a question “arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree,” within the meaning of s. 244. And this may be divided into two questions: whether the defendants were and are representatives of the judgment-debtor, and whether the question in dispute is a question between the decree-holders and such representatives in the sense intended by the section.

The provision formerly in force corresponding to s. 244, namely, s. 11 of Act XXIII of 1861, was limited in its operation to questions arising between parties to the suit, and the question arose whether the term “parties” applied to persons who had not been made parties before decree, but against whom execution was sought as heirs of the judgment-debtor upon his death after decree. In the present section the words “or their representatives” have been added; and I entertain no doubt that they apply to persons against whom or against the property in whose hands execution is sought, on the ground that they are the heirs of a judgment-debtor who has died after decree.

As regards the kind of questions intended in s. 244, the matter I think is pretty clear from the provisions of s. 234. Under that section the representative can be made liable “to the extent of the property of the deceased which has come to his hands and has not been duly disposed of.” So that two kinds of property can be attached: First, property of the ancestor found in the hands of the heir; and, secondly, the property of the heir, from whatever source derived, to the extent to which he has wasted the assets descended to him without satisfying the debts by the deceased. In the case now before us, the property is of the first kind—property said to be liable to execution in the hands of heirs as assets inherited from their ancestor. In such a case the question

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that ordinarily arises is, whether the property has so descended or not. That is a question in which the parties interested are the judgment-creditor on one side, and the alleged heir himself on the other. The persons interested would be the same if the property against which execution was sought were the property of the heir himself which it was sought to charge on the ground of his having wasted the inherited assets; the provision in s. 234 for taking an account makes this plain. Upon the construction of the words of the section, it appears to me that the question which the plaintiff seeks to raise in this case not only arose, but was decided in the execution proceedings between his vendor and the present defendants brought in as representatives of the original judgment-debtor, and that s. 244 bars this suit.

An examination of the decisions leads to the same result. The cases fall into two classes. The first class consists of cases in which a person is originally made a party in a representative capacity, or is subsequently made a party in consequence of the death of an original party before decree. In this case, it is clearly settled I think that such a person is a party to the suit within the meaning of s. 244, and that a question between him and the decree-holder, as to whether property has come to him as the representative of the judgment-debtor, and so is liable to be taken in execution of the decree against him as such representative, or on the other hand belongs to himself alone and not in such representative character, is one that must be decided in the execution proceedings, and not by suit. The governing authority on the subject is the decision of the Privy Council in *Chowdry, Wahed Ali v. Jumae* (1); and it has been followed and applied in the sense I have indicated in several subsequent cases in this country—*Oseemunnissa Khatoon v. Ameerunnissa Khatoon* (2); *Arundadhi Annmyar v. Natesha Ayyar* (3); *Nimba Harishet v. Sitaram Paraji* (4).

The second class of cases consists of those in which the representatives have not been made parties to the suit before decree; but in which, in consequence of the death of the judgment-debtor after decree, a question arises as to the rights of the

(1) 11 B. L. R., 147.

(3) I. L. R., 5 Mad., 391.

(2) 20 W. R., 162.

(4) I. L. R., 9 Bom., 458.

decree-holder to execute the decree against the representatives or the property said to have descended to them.

Under Act XXIII of 1861 it was held, both by the Madras High Court in *Buddu Ramaiya v. Venkaiya* (1), and by this Court in *Ameerunnissa Khatoon v. Mozuffer Hossein Chowdhry* (2), that representatives proceeded against in execution of a decree against the person they represented, were parties to the suit within the meaning of the section corresponding to the present s. 244. That question, it seems to me, no longer arises, because in s. 244 the representatives are expressly mentioned. In both of those cases, and in a series of subsequent cases, it has been held, in accordance with the analogy of the other class of decisions already mentioned, that questions arising between a decree-holder and the representatives, of the judgment-debtor as to whether property has come to the representatives as such, and so is liable to be taken in execution, or is their own property derived from any other source, and therefore not so liable, must be decided in the execution proceeding and not by suit. *Kuriyali v. Mayan* (3); *Ram Ghulam v. Hazaree Kuar* (4); *Sitaram v. Bhagwan Das* (5).

I only know of two cases which seem to me distinctly inconsistent with the law established, as I think by the two classes of decisions to which I have referred—*Abdul Rahman v. Muhammad Yar* (6); and *Awadh Kuari v. Raktu Tewari* (7). I prefer to follow the view which seems to me most naturally to follow from the language of the Act, and which is supported by the preponderance of authority.

Several cases were cited to us to which, I think it unnecessary to do more than refer, because the decisions turned upon considerations which do not apply to the case now before us. They are cases in which it has been held that a claim either by the judgment-debtor or by his representatives to property attached in execution, made not in his own right but as a trustee, does not fall within s. 244. *Shankar Dyal v. Amir Haidar* (8); and

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(1) 3 Mad., 263.

(2) 12 B. L. R., 65.

(3) I. L. R., 7 Mad., 255.

(4) I. L. R., 7 All., 547.

(5) I. L. R., 7 All., 733.

(6) I. L. R., 4 All., 190.

(7) I. L. R., 6 All., 109.

(8) I. L. R., 2 All., 752.

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Nath Mal Das v. Tajammul Husain (1). The more recent case of *Bahori Lal v. Gauri Sahai* (2), in which the facts were very peculiar, and quite unlike those of the present case, was decided by one at least of the Judges before whom it came on the ground that it fell within the same principle. It remains to mention two other cases which have been relied upon as inconsistent with the general current of the authorities—*Kanai Lal Khan v. Sashi Bhuson Biswas* (3); and *Kameshwar Pershad v. Run Bahadur Singh* (4). The first of these cases seems to me to decide nothing touching upon the present question except this,—that where a defendant dies, and some one is substituted, rightly or wrongly, as being his representative, the latter, though he becomes a party, becomes a party to the original suit, the character and scope of which are not enlarged, but remain the same as they were before; and that therefore the person so brought in is not bound to raise in that suit, either before decree or in execution proceedings, any question not properly within the scope of the suit, and not arising out of the execution of the decree actually passed. In *Kameshwar Pershad v. Run Bahadur Singh* (4) what was decided, and decided in the execution proceedings, was that a man cannot be made liable in execution as the representative of a deceased judgment-debtor, in respect of property which he has obtained from the judgment-debtor by a title prior to decree, or inherited from somebody else, though he may be so made liable in respect of property inherited from the judgment-debtor after decree.

I am of opinion that the present suit is barred by s. 244, and that the order of the District Judge should be set aside, and the decree of the Subordinate Judge maintained with costs in both Appellate Courts.

MACPHERSON, J.—I am of the same opinion, and hold that the suit is barred by s. 244, and that consequently the order of the District Judge must be set aside, and the decree of the Subordinate Judge restored with costs in both Appellate Courts.

J. V. W.

Appeal allowed.

(1) I. L. R., 7 All., 36.

(3) I. L. R., 6 Calc., 777.

(2) I. L. R., 8 All., 626.

(4) I. L. R., 12 Calc., 458.